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No. 58515-1-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CURTIS A. BEAUPRE,

Plaintiff/Respondent,

vs.

PIERCE COUNTY,

Defendant/Appellant

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

FOREIGN CASES **PAGE**

I.
STATEMENT OF ISSUES

Beaupre, the plaintiff below and the respondent in this court, believes that this case presents the Court with two issues for consideration.

1. Has Pierce County waived the affirmative defenses of the Professional Rescuer Doctrine and the Fireman's Rule by failing to plead either of them in its Answer and Affirmative Defenses filed in response to the Complaint, and by concealing these defenses during discovery?

2. If not, should this court expand the Professional Rescuer Doctrine and the Fireman's Rule to protect not only the one whose conduct brings the rescuer to the scene, but all of the rescuer's fellow servants, as well, contrary to the public police expressed in RCW 41.26.281?

II.
STATEMENT OF THE CASE

2.1 FACTUAL BACKGROUND

The facts of the present case are not really in dispute. Certainly, the parties might well describe the facts in different terms, but the essential facts remain undisputed.

At all times material hereto, Curtis Beaupre (hereinafter frequently referred to as "Beaupre"), was a career police officer and a sergeant with the Pierce County Sheriff's Department. (CP 3 and 9).

In the early morning hours of November 1. 2003, Beaupre and other members of the Pierce County Sheriff's Department were pursuing one Christopher Jenkins, a domestic violence suspect who was driving south in the north-bound lanes of I-5 at a very slow rate of speed. Several officers had exited their patrol vehicles, believing that the suspect's vehicle was pinned in and would have to stop. The suspect was, however, able to continue on past the blocking patrol car. Sgt. Beaupre was one of the officers on foot, and was jogging along side of the suspect's vehicle with his sidearm drawn and pointed at the suspect while shouting commands at him. (CP 5, 27-30).

While engaged in this attempt to apprehend the suspect, Sgt. Beaupre was struck from behind by the rear end of another patrol car being driven by Deputy Win Sargent who was backing his patrol vehicle either to ram the suspect's vehicle, or to turn around and pursue the suspect's vehicle. The rear end of

Deputy Sargent's patrol vehicle struck Sgt. Beaupre so hard that it knocked him some five or ten feet, causing him to land immediately and directly in front of the front wheels of the suspect's vehicle, which then ran over his pelvis before he could move out of the way. (CP 5, 27-30). As a result, plaintiff sustained permanent and disabling pelvic injuries which have ended his career. (CP 5-6, Complaint ¶¶ 4.5 through 4.8).

Beaupre contends that Deputy Sargent acted negligently in backing his patrol vehicle into Beaupre, and knocking him under the wheels of the suspect's vehicle; and that Pierce County was negligent in failing to provide Deputy Sargent with additional training, given his exceptional accident history, which included several backing accidents.

2.2 PROCEDURAL BACKGROUND

Beaupre's Complaint in this matter was served on Pierce County on September 10, 2004, pursuant to RCW 41.26.281, which grants members of the Washington Law Enforcement Officers and Fire Fighters benefit system the right to sue their governmental employers for negligently injuring them. See *Fray v. Spokane County*, 134 Wash.2d 637, 952 P.2d 601 (1998).

On October 7, 2004, Pierce County filed its Answer and Affirmative Defenses, which makes absolutely no mention of either the Professional Rescuer Doctrine or the Fireman's Rule. (CP 9-12).

Discovery began with Beaupre serving Pierce County with a comprehensive set of Discovery Requests which included interrogatories and requests for production seeking detailed and specific information as to each of Pierce County's affirmative defenses. Pierce County's responses to Beaupre's Discovery Requests did not mention either the Professional Rescuer Doctrine or the Fireman's Rule, and contained no indication whatsoever that Pierce County would rely upon either of these affirmative defenses. (CP 215–218). (A copy of the relevant discovery requests and Pierce County's responses is attached as Appendix A). The discovery cutoff date of April 17, 2006 came and went, with still no mention of either the Professional Rescuer Doctrine or the Fireman's Rule. (CP 177).

Finally, on approximately April 20, 2006, after almost two years of litigating this case, Pierce County filed its motion for summary judgment and, for the first time ever, asserted the

affirmative defenses of the Professional Rescuer Doctrine and the Fireman's Rule, contending that Beaupre's cause of action should be summarily dismissed on the basis of these two never before raised affirmative defenses.

Oral argument was held on May 19, 2006, just over two weeks before the scheduled trial date, and the trial court's order and memorandum decision denying Pierce County's motion for summary judgment was handed down on June 15, 2006. Unfortunately, the court chose to deny the motion by holding that both the Professional Rescuer Doctrine nor the Fireman's Rule were inapplicable to the present case; rather than on the procedural issue raised by Pierce County's total failure to plead, or even mention either affirmative defense in almost two years of litigation. (CP 116-118 and 119-124).

III.
ARGUMENT

The trial court should never even have reached the merits of Pierce County's assertion of the affirmative defenses of the Professional Rescuer Doctrine and the Fireman's Rule. By the time that Pierce County's Motion for Summary Judgment was

heard, these affirmative defenses had long since been waived by Pierce County and neither was still a triable issue in the case.

Instead, the matter should have been decided on the basis of Beaupre's argument that Pierce County's complete failure to plead either of these two affirmative defenses in its Answer, and its failure to disclose either affirmative defense in response to Beaupre's discovery requests, or at any other time during almost two years of litigation, constitutes a waiver of both of these affirmative defenses.

3.1 ANY THEORY WHICH IS WITHIN THE PLEADINGS AND THE PROOF IS SUFFICIENT TO SUSTAIN A TRIAL COURT DECISION.

This court may, and should, affirm the holding of the trial court on any grounds supported by the pleadings and the record. *Eagle Pac. Ins. Co. v. Christensen*, 85 Wn. App. 695, 707, 934 P.2d 715 (1977); affirmed 135 Wn.2d 894, 959 P.2d 1052 (1998).

In *Fairwood Greens Homeowners v. Young*, 26 Wn. App. 758, 762, 614 P.2d 219 (1980), Division I stated that:

> It is well settled, however, that if a judgment is correct, its result may be sustained on any theory within the pleadings and proof. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Thompson v. Thompson*, 82 Wn.2d 352, 510 P.2d 827 (1973).

In the present case, dismissal of Pierce County's motion for summary judgment was the correct ruling, not only for the reasons proffered by the trial court in its Memorandum Decision (CP119-124), but because, long before Pierce County's Motion for Summary Judgment, the Professional Rescuer Doctrine and Fireman's Rule had ceased to be triable issues in the case. Pierce County had hidden its reliance upon these affirmative defenses for almost two years, until discovery had closed and the final trial date was only a few short weeks away.

3.2 BOTH THE PROFESSIONAL RESCUER DOCTRINE AND THE FIREMAN'S RULE HAVE BEEN WAIVED BY PIERCE COUNTY AND ARE NO LONGER TRIABLE ISSUES.

By concealing the affirmative defenses of the Professional Rescuer Doctrine and Fireman's Rule during almost two years of litigation, only to raise them, for the first time in a last minute Motion for Summary Judgment, Pierce County has, for at least three reasons, waived both affirmative defenses.

3.2.1 CR 12(b) requires that these defenses be pled in the defendant's answer to the complaint.

Rule 12(b) of the Civil Rules for Superior Court requires that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, . . . (Emphasis added).

The Professional Rescuer Doctrine and the Fireman's Rule are each clearly a "defense in law or fact, to a claim for relief," and an answer is a required response to a complaint. CR 7(a). As a result, Pierce County was required to assert these defenses in its Answer. It failed to do so. (CP 9-13). As stated in *Butler v. Joy*, 116 Wn.App. 291, 295, 65 P.3d 671 (2003):

> CR 12(b) provides that every defense must be asserted in the responsive pleading, except that certain defenses may also be asserted by motion at the option of the pleader. (Emphasis added).

Quoting from *King v. Snohomish County*, 146 Wn.2d 420, 426-27, 47 P.3d 563 (2002), the *Butler* court goes on to say that:

> As noted in *King*, "[t]he doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." 146 Wn.2d at 424 (citing *Lybbert*, 141 Wn.2d at 40). (Emphasis added).

Pierce County has suggested that pleading Assumption of the Risk as an affirmative defense in its Answer and Affirmative

Defenses is sufficient because the Professional Rescuer Doctrine and the Fireman's Rule are based on the doctrine of Assumption of the Risk. This will be discussed in some detail in section 3.2.4 of this brief.

Pierce County's failure to plead the Professional Rescuer Doctrine and the Fireman's Rule was either an intentional deception to misdirect the plaintiff, or an oversight. I prefer to believe that it was simply an oversight. In either event, however, it is fatal to the defenses of both the Professional Rescuer Doctrine and the Fireman's Rule. The defendant's failure to plead these avoidances or affirmative defenses in its Answer violates both the letter and the spirit of the Civil Rules. The days of "wheat field witnesses" and "trial by ambush" are gone, or should be at least.

The law in this jurisdiction is quite clear that a defendant may not lie in the weeds to ambush a plaintiff with affirmative defenses which have not been plead as required by the Civil Rules, or which have been disguised as something they are not, and then sprung on an unsuspecting plaintiff in a last-minute

motion for summary judgment after discovery has closed and trial is just around the corner.

"Affirmative defenses are waived unless they are timely pleaded, asserted in a CR 12(b) motion, or tried by the express or implied consent of the parties. *First State Insurance v. Kemper National*, 94 Wn.App. 602, 614, 971 P.2d 953 (1999).

3.2.2 CR 8(c) requires that all avoidances and affirmative defenses be set forth.

Rule 8(c) of the Civil Rules for Superior Court requires that:

> In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.

The Professional Rescuer Doctrine and the Fireman's Rule are each, very clearly, a "matter constituting an avoidance or affirmative defense." As such Pierce County was duty bound to "set forth affirmatively" each of these defenses in its Answer. This was not done.

The failure to plead an avoidance or affirmative defense, as required by CR 8(c) constitutes a waiver of the defense. *Deyoung v. Cenex Ltd.*, 100 Wn.App. 885, 896, 1 P.3d 587 (2000).

See also *Hogan v. Sacred Heart*, 101 Wn.App. 43, 54, 3-2 P.3d 968 (2000), where it was said that:

> A party generally waives affirmative defenses or matters of avoidance that they fail to affirmatively plead, assert in a motion under CR 12(b), or try by the express or implied consent of the parties. *Bernsen v. Big Bend Elec. Coop.*, 68 Wash. App. 427, 433-34, 842 P.2d 1047 (1993). (Emphasis added).

In the present case, there have been no CR 12(b) motions filed, and it cannot be said, under any stretch of the imagination, that the issues of the Professional Rescuer Doctrine or the Fireman's Rule have been tried "by the express or implied consent of the parties," especially since they have not even been asserted until defendant's last minute Motion for Summary Judgment.

It is not only the specific affirmative defenses enumerated in CR 8(c) which must be pled in a defendant's responsive pleading, but "any other matter constituting an avoidance or affirmative defense" must also be pled or it is waived. As stated in the case of *Sprague v. Sumitomo Forestry*, 104 Wn.2d 751, 757, 709 P.2d 1200 (1985):

> CR 8(c) enumerates certain specific affirmative defenses which must be pleaded, but includes a general clause "and any other matter constituting an avoidance or affirmative defense." While this language is very general, it clearly contemplates matters which are in avoidance or are a specific affirmative defense.

It seems clear enough that the Professional Rescuer Doctrine and the Fireman's Rule are each defenses contained within the phrase "and any other matter constituting an avoidance or affirmative defense." As a result, the defendant's failure to plead them constitutes a waiver of these defenses.

Referring to affirmative defenses, the court in *Farmers Insurance Company of Washington v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976), stated that:

> In general, if such defenses are not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. *Radio Corp. of America v. Radio Station XYFM, Inc.*, 424 F.2d 14 (10th Cir. 1970). See also 3 L. Orland, Wash. Prac. 607 (2d ed. 1968). (Emphasis added).

See also *Sprague v. Sumitomo Forestry*, 104 Wn.2d 751, 757, 709 P.2d 1200 (1985); *Rainier National Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981); *Henderson v. Tyrrell*, 80

Wn. App. 592, 624, 910 P.2d 522 (1996); *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 896, 1 P.3d 587 (2000); and *Hogan v. Sacred Heart*, 101 Wn. App. 43, 54, 2 P.3d 968 (2000).

As a result, long before Pierce County's Motion for Summary Judgment, the Professional Rescuer Doctrine and the Fireman's Rule had ceased to be "triable issues in the case," and the trial court never should have reached these issues.

3.2.3 Pierce County has waived its affirmative defenses at Common Law, by its Dilatory Assertion of them.

The common law doctrine of waiver has been recognized by our Supreme Court and by all three Divisions of our Court of Appeals as being applicable to affirmative defenses which a defendant has failed to plead, has concealed, or has otherwise been dilatory about asserting. *King v. Snohomish County*, 105 Wn. App. 857, 865, 21 P.3d 1151 (2001); and *Lybert v. Grant County*, 141 Wn.2d 29, 38-40, 1 P.3d 1124 (1999).

In *Lybert*, at pages 38 to 39, the court discussed, at some length, the common law doctrine of waiver, as it applies to affirmative defenses which a defendant has been dilatory in asserting, as follows:

> Significantly, all three divisions of the Court of Appeals of this state have also recognized the common law doctrine of waiver. (Citations omitted). Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. Romjue, 60 Wn. App. at 281. It can also occur if the defendant's counsel has been dilatory in asserting the defense. *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979) (citing 5 Charles Alan Weight & Arthur R. Miller, Federal Practice and Procedure § 1344, at 526 (1969)), review denied, 93 Wn.2d 1004 (1980). (Emphasis added).

At page 40 of its decision, the court goes on to discuss the reason for the adoption of the rule and the purposes intended to be accomplished by its application.

> Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.
>
> We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed. (Emphasis added).

That is exactly what Pierce County has done in the present case. It has employed deceptive and dilatory practices in an effort to gain an unfair advantage over the plaintiff. In its answer, it plead the affirmative defense of Assumption of the Risk, but did not plead either the Professional Rescuer Doctrine or the Fireman's Rule. Now Pierce County asserts that because the Professional Rescuer Doctrine and the Fireman's Rule have their basis in the doctrine of Assumption of Risk, pleading Assumption of Risk is the functional equivalent of pleading the Professional Rescuer Doctrine and the Fireman's Rule.

If Pierce County's intent in pleading "Assumption of Risk" was to conceal its reliance on the Professional Rescuer Doctrine and the Fireman's Rule so as to be able to spring these defenses on the plaintiff at the last moment, as it did, to gain an advantage, then Pierce County's conduct is exactly the conduct that the doctrine of waiver is designed to prevent. As stated in *Lybert*, supra, quoting from *Santos*,[1] a "defendant cannot justly be allowed to lie in wait, masking by misnomer its" affirmative defenses. (Emphasis mine).

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[1] *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir. 1990).

3.2.4 Pleading "Assumption of the Risk" does not provide adequate notice of Pierce County's reliance upon either the Professional Rescuer Doctrine or the Fireman's Rule.

Not wanting to admit, I suspect, that it failed to plead either the Professional Rescuer Doctrine or the Fireman's Rule in its Answer and Affirmative Defenses, Pierce County now claims that in pleading Assumption of the Risk, as it did, it was giving adequate notice that it would rely upon the Professional Rescuer Doctrine or the Fireman's Rule as affirmative defenses.

Under the current state of the law in Washington, the Professional Rescuer Doctrine/Fireman's Rule operates only to shield the person whose conduct is responsible for bringing the rescuer to the scene (Christopher Jenkins in the present case), and not one whose negligence causes injury to the rescuer after he has arrived at the scene (Deputy Win Sargent and Pierce County here). As a result, neither the Professional Rescuer doctrine nor the Fireman's Rule would have any applicability to the present case but for the fact that Pierce County is, through this case, attempting to extend these doctrines to protect a fellow employee and his or her employer from liability, as well.

As a result, there was no way that the plaintiff could be expected to guess that either the Professional Rescuer Doctrine or the Fireman's Rule would be raised by Pierce County from the fact that the defendant pled Assumption of the Risk.

In addition, Pierce County's failure to disclose its reliance on the Professional Rescuer doctrine and the Fireman's Rule in its responses to Beaupre's discovery requests belies any contention that the purpose of failing to plead or to otherwise disclose the affirmative defenses of the Professional Rescuer Doctrine and the Fireman's Rule was anything but a bold-faced attempt to gain an unfair advantage through a "trial by ambush" style of advocacy, which has little place in our present-day adversarial system." *Lybert*, supra at p. 40.

3.3 THE PROFESSIONAL RESCUER DOCTRINE AND FIREMAN'S RULE ARE NOT APPLICABLE TO THE PRESENT CASE.

The Rescue Doctrine, Professional Rescue Doctrine, and the Fireman's Rule are all somewhat intertwined and related. In *Ballou v. Nelson*, 67 Wn.App. 67, 834 P.2d 97 (1992), Division I discusses, as some length, each of these doctrines, beginning at page 70, as follows:

> The rescue doctrine is intended to provide a source of recovery to one who is injured while undertaking a reasonable rescue of a person who has negligently placed himself in a dangerous position.
>
> The professional rescuer doctrine imposes a restriction on the rescue doctrine by denying its benefits to professional rescuers who are paid to assume risks inherent in their work.
>
> The "fireman's rule" is similar to the professional rescuer doctrine in that it limits application of the rescue doctrine. However, the fireman's rule has a separate history and theoretical basis. . . . The fireman's rule per se has never been applied in Washington.

Under the law as it stands in Washington, neither the Professional Rescuer doctrine nor the Fireman's Rule is applicable to the facts of the present case for at least two reasons. First, neither of these doctrines operates to shield a person whose negligence causes injury to the rescuer after he has arrived at the scene, but rather, only shield the one whose conduct is responsible for bringing the rescuer to the scene. See *Sutton v. Shufelberger*, 31 Wn.App. 579, 587, 643 P.2d 920 (1982). and then, only as to risks that are inherent in and necessary to the rescue. See *Ward v. Torjussen*, 52 Wn.App. 280, 758 P.2d 1012 (1988).

3.3.1 It is only the person whose negligence brought the rescuer to the scene who is shielded by the professional rescuer doctrine or the fireman's rule.

Ward v. Torjussen, 52 Wn.App. 280, 758 P.2d 1012 (1988), was an action by a police officer for personal injuries sustained in an automobile collision which occurred while the officer was responding, with red light and siren, to a request to back up another officer in searching for a prowler. The trial Court dismissed Ward's claim on summary judgment, and she appealed. A primary issues on appeal was the proper application of the Professional Rescuer Doctrine, and whether it barred her cause of action against Torjussen for running into her while she was performing her duties. The Court reversed, holding, at page 287, that:

> Moreover, the professional rescuer rule only relieves the perpetrator of the act that caused the rescuer to be at the scene; **it does not relieve a party whose intervening negligence injures the rescuer**. (Emphasis added).

In *Sutton v. Shufelberger*, 31 Wn.App. 579, 643 P.2d 920 (1982) a Seattle motorcycle officer who had made a traffic stop parked his motorcycle directly behind the vehicle that he had

stopped. As he dismounted his motorcycle, a truck ran into the motorcycle, injuring the officer. A jury returned a verdict in his favor and the defendant appealed.

The defendant truck driver asserted the Professional Rescuer Doctrine and the Fireman's Rule (which the Court treats as one in the same) as a defense to the action. Division I affirmed the trial Court, stating that:

> The defendants concede that the "fireman's rule" has never been applied to police officers in Washington State, but urge us to do so as a matter of policy. We find it unnecessary to determine whether the rule should be adopted in this state because it would not apply to the facts of this case in any event.
>
> The so-called "fireman's rule" negates liability to the fireman, police officer or other official by the one whose negligence or conduct brought the injured official to the scene. The rule denies recovery by the injured official from the one whose sole connection with the injury is that his act placed the fireman or police officer in harm's way. (Emphasis added).

Here, either doctrine can only operate to prevent a recovery by plaintiff Beaupre from "the one whose negligence or conduct brought the injured official to the scene," and that would be Christopher Jenkins, the driver of the suspect vehicle.

Neither doctrine will serve to prevent the plaintiff from recovering from Pierce County. It is not the one whose negligence brought Sergeant Beaupre to the scene. Rather, Pierce County is liable for its own negligence and for the negligent actions of its employee and servant, Deputy Sargent, whose intervening negligence caused the plaintiff to be thrown immediately beneath the wheels of another vehicle.

Deputy Sargent is not the one whose negligence brought the plaintiff to the scene; rather, he is the truck driver who ran into the Seattle motorcycle officer, or the automobile driver who hit Officer Ward on her way to assist on a prowler call.

See also *Ballou v. Nelson*, *supra*, where the Court also considered the proper application of the Professional Rescuer Doctrine and the Fireman's Rule, holding that:

> While the fireman's rule prevents a fireman recovering for negligently or recklessly caused fire, it does not provide protection to one who commits independent acts of misconduct after fire fighters have arrived on the premises. (Emphasis added).

Deputy Sargent's negligence cannot be said to have been what brought the plaintiff to the scene; rather, his were

"independent acts of misconduct" which occurred after the plaintiff arrived at the scene.

Both the *Sutton* and *Ballou* courts used an illustration from a California case to make the point clear, pointing out that a police officer struck by a speeding vehicle while placing a ticket on an illegally parked car may maintain an action against the speeder, but not against the owner of the parked car, whose actions brought the officer to the scene in the first place. Deputy Sargent is the driver of the speeding vehicle, so to speak.

3.3.2 The professional rescuer doctrine and the fireman's rule are applicable only to risks which are inherent in and unique to the particular rescue effort.

While the case of *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975), in discussing the Professional Rescuer Doctrine, makes it clear that a professional rescuer is generally within the intended scope of the "rescue doctrine," it also opines that professional rescuers assume "certain hazards" which are not assumed by the voluntary rescuer; but this does not include all hazards that may be present at the scene. At page 978, the *Maltman* Court goes on to say that:

> We believe that a professional rescuer, in making a deliberate attempt at saving a life, and under the correct factual setting, is within the intended scope of the "rescue doctrine." The doctrine does not necessitate that an individual be prompted by purely altruistic motives. This is not to say the doctrine applies in the same exact fashion to both voluntary and nonvoluntary rescuers. In the case of a professional rescuer certain hazards are assumed which are not assumed by a voluntary rescuer. The professional rescuer, however, does not assume all the hazards that may be present in a particular rescue operation. (Emphasis added).

Unfortunately the *Maltman* Court fails to give us much direction as to exactly which risks a professional rescuer assumes in a given case. In *Maltman*, the question was relatively straight forward, and certainly nothing like the situation with which we are here confronted. There have, however been cases in Washington which are quite analogous, and which should give us some direction.

In *Ballou, supra,* two officers were found not to have assumed the risks that they would be attacked by two intoxicated, abusive, and obnoxious patrons that they were ejecting from a bar, in spite of fact that one officer testified that "he always anticipates a physical altercation when asked to remove an intoxicated person from a bar," and the second officer

testified that "he always has in the back of his mind an assumption that 'things could get physical.'" (*Ballou, supra* at page 69).

In *Ward, supra*, it will be remembered that Officer Ward was operating her patrol vehicle with her light bar and siren both working while on the way to back up another officer on a prowler call. Another vehicle hit her at an intersection. The Court held that the risk of having a collision is not inherent in responding at high speeds in a police vehicle.

In *Sutton, supra,* the possibility of being struck by another vehicle while parked at the edge of the road to write a ticket for a violator was apparently not a risk which was inherent in the duty to stop violators and write tickets.

If none of the hazards responsible for the injuries in these three Washington cases is inherent in the police duties being conducted at the time of the injuries, then it is very difficult, indeed, to imagine what risks are inherent in police work.

What does seem quite clear, however, is that having another patrol car back into one of several officers on foot and

knock him directly under the wheels of a suspect vehicle is not an inherent risk of engaging in the pursuit of a violator.

Only if having a fellow police officer back into you while you and other officers are out of your vehicles and engaged in making an arrest can be said to be a hazard which is inherent in and necessary to the operation of making an arrest, will it prevent the injured officer from recovering for his injuries; but then, only as to the person whose conduct caused the officer to be at the scene; not as against another whose active negligence harms the officer after he has arrived at the scene.

3.4 PIERCE COUNTY'S ARGUMENT FOR THE EXTENSION OF THE PROFESSIONAL RESCUER DOCTRINE AND FIREMAN'S RULE WOULD RUN AFOUL OF THE PUBLIC POLICY EVIDENCED BY RCW 41.26.281.

I do not believe that Pierce County would argue that, under the current state of the law in Washington, either the Professional Rescuer Doctrine or the Fireman's Rule would apply to the facts of the present case to shield Pierce County either from its own negligence or from that of its employee, Deputy Sargent. Rather, Pierce County argues that this Court should extend these two doctrines to shield not only the one

whose negligence brought the rescuer to the scene, but all of the rescuer's co-workers engaged in the same rescue operation or police action. To support its argument, Pierce County relies almost exclusively on California case law.

3.4.1 California's case law arises from a statutory scheme which is entirely different from that which obtains in Washington.

The statutory landscape from which California case law arises is vastly different from the statutory scheme that exists in Washington.

California has chosen to preserve the exclusivity of its Workers Compensation Act,[2] so that its firefighters and police officers are prohibited from suing their municipal employers for injuries sustained as a result of the employer's negligence. In California, Beaupre would not have been allowed to bring his suit in the first place. As a result, the question plaguing the California courts which has resulted in so much litigation, has been not whether a rescuer may sue his or her employer when he or she is injured through the negligence of a fellow employee; no, such suits are prohibited by the exclusivity of California's

[2] See *Calatayud v. State of California*, 18 Cal. 4th 1057 (1998).

Workers Compensation Act. Rather, the question which has troubled the California courts has been whether the injured police officer or firefighter has a cause of action against another agency when injured through the negligence of an employee of that other agency during joint operations.[3] Such suits would, of course, not be prohibited by the Workers Compensation Act, but the California courts have seen fit to take that cause of action away from their police officers and firefighters, as well.[4]

The California controversy has centered around the proper interpretation of §1714.9(a)(1) of the California Civil Code, which reimposes a duty of ordinary care, otherwise abrogated by the Fireman's Rule, as to those whose negligence creates a need for emergency services. The statute specifically provides that the liability imposed by it does not extend to the employer of a police officer or a firefighter,[5] and the California courts have determined that this same statute also shields other governmental employers from suits by public safety members.[6]

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[3] See, for example *Calatayud v. State of California*, *supra*.
[4] See *City of Oceanside v. Superior Court*, 81 Cal. App. 4th 269 (2000).
[5] See §1714.9(d) of the California Civil Code.
[6] *Calatayud v. State of California*, *supra*.

The statutory scheme is quite different in Washington. We have no equivalent of §1714.9(a)(1) of the California Civil Code. Quite the contrary. Our legislature has taken a more enlightened approach with the enactment of RCW 41.26.281, which specifically authorizes a limited cause of action by police officers and firefighters against their governmental employer for injures negligently inflicted. *Fray v. Spokane County*, supra.

Perhaps the greatest difference between the statutory schemes of California and Washington, relative to this issue, is the fact that Washington has enacted RCW 41.26.281, which has no counterpart under California law.

While California has elected to prevent its public safety workers from suing their own employers for negligently injuring them, through its Workers Compensation Act, and from suing another public employer when injured by the negligence of its employee, through legislation and judicial decision;[7] Washington has chosen to take an entirely different direction. RCW 41.26.281 specifically grants police officers and firefighters the right to sue their governmental employers if they are injured

[7] California Civil Code §1714.9(d), and *City of Oceanside v. Superior Court*, supra.

through the negligence of that employer or a fellow servant. *Fray v. Spokane County, supra.*

Thus, while California has legislatively and judicially restricted, to the point of virtual elimination, the rights of its police officers and firefighters to sue any governmental employer for negligently injuring them; Washington has legislatively provided an environment in which a police officer or fireman injured through the negligence of his employer or a fellow servant, may both partake of the benefits of Washington's Workers Compensation Act, and still sue the negligent employer pursuant to RCW 41.26.281.

3.4.2 California's different statutory scheme gives rise to different public policy considerations.

The California court in *City of Oceanside v. Superior Court, supra,* discusses, in some detail, the four public policy considerations for disallowing recovery from fellow professional rescuers employed by another agency. Under California's statutory scheme, the four public police considerations may be persuasive. They do not hold up, however, under the statutory approach taken by the Washington Legislature.

A. Public safety takes precedence over the safety of fellow rescuers.

The first of the public policy reasons given by the California courts for disallowing recovery by a professional rescuer from fellow professional rescuers employed by another agency is that the professional rescuer's primary responsibility is the safety of the public, and the discharge of these duties must take precedence over avoiding injury to fellow officers.

This policy does not stand up well under closer scrutiny. Any lack of care at a scene which results in injury of one officer, does nothing to advance the safety of the public. Quite the contrary, the injured officer is no longer able to assist in the operation, and his injury will usually take at least one additional officer out of the effort to care for the injured officer. This only decreases the likelihood that the rescue or other operation will ultimately be successful.

B. Litigation over subrogated interests.

A second public policy consideration given by the court is a fear that allowing professional rescuers to bring actions for injuries caused by responding to a fire or other emergency would

involve the parties in costly litigation over rights of subrogation without substantially benefiting the professional rescuer.

In Washington, RCW 41.26.281 resolves questions of subrogation rights by providing that the injured police officer or fireman may only recover "any excess of damages over the amount received or receivable under this chapter."

C. Efficient judicial administration.

The third public policy reason given by the court for disallowing recovery by a professional rescuer from fellow professional rescuers employed by another agency is that efficient judicial administration would be impaired because the difficult problems of determining causation are multiplied in cases which may turn on the propriety of chosen police tactics or emergency procedures.

In Washington, we already have this problem which has existed since 1971, when police officers and firefighters were first given the right to sue their employers for negligently injuring them. It should be said, however, that it does not appear to have been much of a problem. That is what juries are for, after all.

D. The creation of anomalies due to the exclusivity of the California's Workers Compensation Act.

The final public policy consideration mentioned by the California courts for disallowing such recoveries is that, under California's Workers Compensation Act, the injured professional rescuer could not sue his own employer for negligently injuring him. Thus, the injured officer or firefighter would otherwise be allowed to sue when the negligent co-worker was employed by another agency, but not by his own employer.

In Washington, where the enactment of RCW 41.26.281 permits police officers and firefighters to sue their own employer and fellow servants for negligently injuring them, to prohibit the professional rescuer from suing a police officer or firefighter from another agency whose negligence has caused his injury, would create a strange anomaly in the law of this state.

3.4.3 None of the California cases cited by Pierce County is on point.

As previously indicated, the California cases cited by Pierce County all deal with the question of whether to allow a police officer or firefighter negligently injured by another agency

or that agency's employee to sue that other agency. That is not the situation that we have in the present case. Here, the question is whether Beaupre may sue his own employer when its own negligence or that of a fellow servant result in injury. The California courts would say no, but only because of the exclusivity of California's Workers Compensation Act.

With the enactment of RCW 41.26.281 the Washington Legislature has specifically permitted professional rescuers to sue their employers for injuries caused by the negligence of that employer or a fellow servant. Therefore, our Legislature has concluded that the professional rescuer doctrine does not apply to such suits.

3.4.4 The public policy sought to be accomplished by RCW 41.26.281 would be severely diminished by the extension of the professional rescuer doctrine and fireman's rule sought by Pierce County.

Washington is unique in allowing its police officers and firefighters to sue their municipal employers for negligently injuring them. RCW 41.26.281 provides a limited cause of action against a negligent public employer for injuries sustained by police officers and firefighters in its employ. It provides:

> If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

With the enactment of RCW 41.26.281, our legislature has seen fit to provide our police officers and firefighters, who lay their lives on the line for us, with a somewhat broader protection than the same workers enjoy in other states.

Kevin Locke was a firefighter trainee in the employ of the City of Seattle who was severely injured when he fell from a 50 foot ladder during an exercise drill. He sued the City of Seattle for negligence under RCW 41.26.281, claiming that the City fire department employees negligently conducted the drill, resulting in the existence of unsafe conditions causing him to fall. In *Locke v. City of Seattle*, Slip 55256-2-I[8] (a copy of which is attached as Appendix B for the Court's convenience), Division I, beginning at page 8 of the decision, discusses some of the public

[8] The Court should note that only a portion of *Locke v. City of Seattle* is published. No reference will be made to any of the unpublished portions of the decision.

policy considerations relating to RCW 41.26.281, citing *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002).

> While the Industrial Insurance Act immunizes most employers from job related negligence suits, fire fighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job related negligence suits against their employers. (Emphasis added).

Also on page 8 of its decision, the *Locke* court goes on to note that:

> In Hansen v. City of Everett, 93 Wn. App. 921, 926, 971 P.2d 111 (1999), this court further explained the purposes and effects of RCW 41.26.281: `By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.' We also explained that RCW 41.26.281 provides a limited quid pro quo to the city in exchange for providing worker's compensation because employers are entitled to deduct worker's compensation payments from damages otherwise proved in a lawsuit against the employer. Hansen, 93 Wn. App. at 927. (Emphasis added).

Later, beginning at the top of page 9 of its decision, the *Locke* court goes on to point out that RCW 41.26.281 not only provides extra protection to police and firefighters, but benefits their employers, as well.

> Thus, RCW 41.26.281 serves vital governmental purposes, satisfying the `rational basis' inquiry. It gives extra protection to fire fighters and law enforcement officers because of the hazardous nature of their occupations, thereby encouraging discipline and efficiency in the workplace. Moreover, under the statute, the governmental employer receives benefits not available to private parties subject to suits in negligence. In this context, the governmental employer occupies a middle ground between nonemployer tortfeasors and nongovernmental employer tortfeasors. (Emphasis added).

Pierce County asks this Court to take away what the Legislature has seen fit to grant police officers and firefighters -- the right to sue their employers when they are negligently injured at the hands of a fellow servant.

Prior to 1971, such a cause of action would have been prohibited by our Workers Compensation Act. In 1971, however, the Legislature enacted RCW 41.26.281 evidencing our State's public policy in relation to its police officers and firefighters: 1) to provide greater protection for police and fire personnel because of the vital and dangerous nature of their work;[9] 2) to create a strong incentive with public employers for improved

[9] See *Hauber v. Yakima County*, supra.

safety;[10] and 3) to encourage discipline and efficiency in the workplace.

The beneficial effect of RCW 41.26.281, in all of these areas and more, would be lost if Pierce County prevails on its argument to extend the Professional Rescuer Doctrine and the Fireman's Rule to suits by police officers and firefighters against their employers for the negligence of a fellow servant, in direct contravention of the clear legislative intent evidenced by the enactment of RCW 41.26.281.

Certainly the Legislature could have elected to immunize public employers from suits by their firefighters and police officers occasioned by the negligent acts or omissions of a fellow servant engaged in the same operation. They did not choose to do so, and this Court should not do it for them.

3.5 PIERCE COUNTY'S MOTION TO STRIKE LACKS MERIT.

Pierce County has filed, in this Court and cause, a Motion to Strike the portions of Beaupre's First Discovery Requests and Pierce County's Responses thereto, attached as "Appendix A" to Beaupre's Motion on the Merits and to this Brief. The document

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[10] See *Hansen v. City of Everett*, 93 Wn. App. 921, 926, 971 P.2d 111 (1999).

in question is offered to show that Pierce County concealed its reliance on the Professional Rescuer Doctrine and the Fireman's Rule during the discovery process.

Pierce county does not claim that the document is false or inaccurate, or that it did, in fact, disclose its reliance upon these affirmative defenses; rather, it contends that Beaupre is not entitled to bring the discovery requests and responses to the attention of this Court because the trial court Judge did not, and would not, include the discovery requests and responses in its Order denying Pierce County's Motion for Summary Judgment.

> It is well settled, however, that if a judgment is correct, its result may be sustained on any theory within the pleadings and proof. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

Discovery requests and the responses thereto certainly constitute a portion of the "pleadings and proof" upon which this Court may elect to sustain the trial court's judgment.

In effect, Pierce County would appear to contend that no document may be considered by this Court unless it was set forth in the trial court's Order on Motion for Summary Judgment as a document called to the attention of the trial court

prior to entry of judgment. This is simply not so. Pierce County has included numerous pleadings in its Designation of Clerk's Papers, which it has, thereby, asked this Court to consider, and which were not included among the documents listed in the trial court's Order on Motion for Summary Judgment.[11]

Since discovery requests and the responses thereto are no longer filed with the clerk's office, they cannot be designated as Clerk's Papers. They are, however, none-the-less, "pleadings and proof" which may be considered by this Court in affirming the trial court's correct decision.

IV.
CONCLUSION

This Court can and should sustain the trial court's correct denial of Pierce County's Motion for Summary Judgment because, at the time of the trial court's consideration of the motion, neither the Professional Rescuer Doctrine nor the Fireman's Rule were still triable issues in the case, due to Pierce

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[11] See, for example: CP 1-2 (Summons); CP 3-8 (Complaint for Damages); CP 9-13 (Defendant's Answer and Affirmative Defenses); and CP 14-16 (Supp. Declaration of J.E. Fischnaller unrelated to the Motion for Summary Judgment);

County's failure to plead them, in violation of CR 12(b) and CR 8(c).[12]

In any case, neither affirmative defense would shield Pierce County from liability for its own negligence or for that of Deputy Sargent, its employee, whose independent negligence occurred only after Beaupre arrived at the scene.[13]

Pierce County's argument for an extension of the Professional Rescuer Doctrine and the Fireman's Rule to shield from liability fellow servants who commit acts of negligence which are independent of the conduct which brought the rescuer to the scene, is based primarily upon California law. All of the California cases cited, however, deal with the liability of another agency when a rescuer is injured by the employee of the other agency during joint operations. These cases are not at all on point.

In addition, California has a statutory framework and related public policies which are very different than those which obtain in Washington.

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[12] *LaPlante v. State, supra; Butler v. Joy, supra; and Farmers Insurance Company of Washington v. Miller, supra.*
[13] *Ballou v. Nelson, supra.*

With the enactment of RCW 41.26.281, our Legislature has taken a more enlightened approach which provides much greater protection for police officers and firemen than is accorded them under the laws of other states, and under California law, in particular. By enacting RCW 41.26.281 the Legislature has concluded that the Professional Rescuer Doctrine and the Fireman's Rule do not apply to suits by injured police officers and firemen against their employers.

Beaupre asks that this Court: 1) rule that neither the Professional Rescuer Doctrine nor the Fireman's Rule remain as triable issues in this case; 2) or in the alternative, that neither of these affirmative defenses is applicable to the facts of this case; 3) deny Pierce County's appeal and remand the case to the trial court for trial in accordance with this Court's ruling; and 4) grant Beaupre an award of statutory attorneys fees and taxable costs relating to this appeal.

DATED this _____ day of February, 2007.

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Law Offices of
J.E. FISCHNALLER

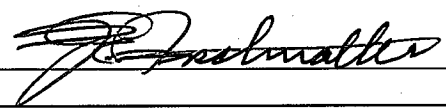
By 
J.E. Fischnaller (WSBA # 5132)
Of Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

The undersigned certifies that, on this date, he deposited in the mails of the United States of America a properly stamped and addressed envelope containing a true and correct copy of the document on which this certificate appears, addressed to counsel of record for each of the parties to this action.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 2-13-07 at Woodinville

Signature 

APPENDIX – A

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CURTIS A. BEAUPRE, Plaintiff, vs. PIERCE COUNTY, Defendant.	No.: 04-2-23610-0 SEA PLAINTIFF'S FIRST DISCOVERY REQUESTS WITH RESPONSES THERETO

TO: The Defendant, Pierce County;

AND TO: Gerald A. Horne and Bertha B. Fitzer, its attorneys of record.

PROCEDURES

1. General. In accordance with Rules 33 and 34 of the Civil Rules for Superior Court of the State of Washington, you have been served with discovery requests which include both interrogatories and requests for the production to which you must respond fully and separately, under oath, within thirty (30) days of the date of service upon you or your attorney. Your responses are to be signed by you and any objections are to be signed by at least one of your attorneys of record, as required by Rule 26(g) and 33(a) of the Civil Rules for Superior Court. The verified original of these discovery requests, together with your responses thereto, must be returned to the

paragraph 7, entitled "Identity of Documents," under "Procedures," which you have identified in answer to the immediately preceding interrogatory.

RESPONSE:

All documents have been previously produced. Defendant reserves the right to supplement this request as information becomes available.

41. Interrogatory: Other Affirmative Defenses. As to each and every other affirmative defense which you claim and which has not previously been addressed in these discovery requests, please state separately as to each, and in as much detail as possible, each and every fact, allegation, or legal proposition upon which you base your assertion of the defense, and "identify," as that term is defined in paragraph 7, entitled "Identity of Documents," under "Procedures," all documents which pertain, in any way, to each such affirmative defense.

ANSWER:

The same facts discussed above support the other affirmative defenses. Defendant reserves the right to supplement this response as further discovery occurs.

42. Request for production: Other Affirmative Defenses. Please produce, in the manner set forth in paragraph 8, entitled "Document Production," under "Procedures," all documents, as that term has previously been defined in paragraph 7, entitled "Identity of Documents," under "Procedures," which you have identified in answer to the immediately preceding interrogatory.

RESPONSE:

All documents have been previously provided.

43. Request for Production: CBA. Please produce, in the manner set forth in paragraph 8, entitled "Document Production," under "Procedures," a copy of the Collective Bargaining Agreement between Pierce

LAW OFFICES OF
J.E. FISCHNALLER
10900 NE 4TH St, Suite 2300, Bellevue, WA 98004
PHONE: 425-990-1007 FAX: 425-820-5648

Not applicable.

SIGNATURES

Plaintiffs' First Interrogatories and Requests for Production of Documents propounded this _____ day of _____, 2004.

Law Offices of
J.E. FISCHNALLER

By _____
J.E. Fischnaller (WSBA # 5132)
Of Attorneys for Plaintiff

Defendant's Answers, Responses and Objections to the foregoing discovery requests submitted this 28th day of February, 2005. The undersigned attorney has read the foregoing answers, responses and objections and does hereby certify that they are in compliance with CR 26(g).

By _____
Of Attorneys for Defendant.

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

VERIFICATION

The undersigned, being first duly sworn on oath, deposes and says: That the undersigned is an officer or agent of the defendant, Pierce County, authorized to make this verification, has read the foregoing discovery requests and the answers and responses thereto, knows the contents thereof, and believes the same to be true.

By _____ Title _____

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2002.

_____
NOTARY PUBLIC in and for the State of Washington, residing at _____.

LAW OFFICES OF
J.E. FISCHNALLER
10900 NE 4TH St., Suite 2300, Bellevue, WA 98004
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APPENDIX – B

2006 App. Slip - 55256-2-I; Locke v. City of Seattle;

Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 55256-2-I
Title of Case: Kevin Locke, Respondent v. City of Seattle, Appellant
File Date: June 19, 2006

SOURCE OF APPEAL

Appeal from Superior Court of King County
Docket No: 02-2-07237-2
Judgment or order under review
Date filed: 11/05/2004
Judge signing: Hon. Michael S Spearman

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

No. 55256-2-I

KEVIN J. LOCKE, Respondent, and TORI LOCKE, husband and wife and the marital community composed thereof, Plaintiff, v. THE CITY OF SEATTLE, a municipal Corporation, and THE CITY OF SEATTLE FIRE DEPARTMENT, Appellants, and the STATE OF WASHINGTON, its subdivisions and agencies, and the WASHINGTON STATE PATROL, JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON, and `JOHN DOES' 1-5, in their individual capacities, Defendants.

PUBLISHED IN PART

FILED: June 19, 2006

DWYER, J. Fire fighter trainee Kevin Locke was injured during a training exercise. A jury found the city of Seattle negligent and returned a substantial verdict in Locke's favor. The city now appeals from the judgment entered on the verdict, raising constitutional, statutory, evidentiary, instructional, and procedural challenges. Finding no error, we affirm.

FACTS

Kevin Locke was hired by the Seattle Fire Department as a fire fighter trainee. The city enrolled him as a `fire fighter' member of the Law Enforcement Officer and Fire Fighter Retirement System (LEOFF) on April 19, 2000.1

From June 25 through June 29, 2000, Locke's class of fire fighter recruits trained at the Washington State Patrol Fire Training Academy in North Bend, Washington. On June 29, during an exercise drill, Locke fell from a 50-foot ladder and was injured.

Locke sued the city of Seattle for negligence.2 Locke brought his claim pursuant to RCW 41.26.281, which provides LEOFF members with the right to bring personal injury claims against their governmental employers.

At trial, Locke argued that the city's fire department employees negligently conducted the training exercise, causing him to suffer from heat, exhaustion, and dehydration, which, along with operational aspects of the training drill, created unsafe conditions that caused him to fall and be injured. The city moved for summary judgment arguing, among other things, that Locke was not a LEOFF member, and that he had assumed the risk of being injured. The trial court denied the motion.

Locke's case was heard by a jury from May 17 to July 7, 2004. At trial, the parties presented testimony from a large number of witnesses and submitted hundreds of exhibits. On July 13, 2004, the jury returned a 10 to 2 verdict for Locke, but found him 10 percent at fault, resulting in a total award of $1,842,800.

The city moved for remittitur, arguing that there was a defect in the jury's calculation of damages. The trial court granted the motion, recalculated the damages, and entered judgment in the amount of $1,513,663.88. The trial court subsequently denied the city's motion for a new trial.

On appeal, the city challenges the basis for Locke's suit on constitutional and statutory grounds and assigns error to numerous trial court rulings. The parties are well aware of the extensive record in this case, very little of which pertains to the city's appellate arguments. Accordingly, the facts relevant to the issues presented will be discussed in connection with the resolution of those issues.

DISCUSSION

The majority of the city's appeal concerns statutory and constitutional arguments regarding the LEOFF statute, RCW 41.26. We therefore begin with a brief description of LEOFF, as provided in Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998):

In 1969, the Legislature enacted a comprehensive benefits plan for police officers and fire fighters titled the "Washington Law Enforcement Officers' and Fire Fighters' Retirement System Act," commonly referred to as LEOFF. This system of benefits was codified as RCW 41.26. LEOFF was amended in 1971 to provide greater benefits to injured police officers and fire fighters than they would receive under the workers' compensation system. One such benefit codified in former RCW 41.26.280 {now RCW 41.26.281} granted LEOFF members a "right to sue" their employers for negligence. This new provision read as follows:
If injury or death results to a member from the intentional or negligent act or omission of {the} member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

Fray, 134 Wn.2d at 643-44 (footnotes omitted). The Fray court also explained that LEOFF members have been entitled to sue their governmental employers for negligent and intentional injuries since 1971, and that a 1992 amendment purporting to repeal that right with regard to LEOFF Plan 2 members was invalid. Id., at 656.

I. RCW 4.96.010 Waives Municipal Sovereign Immunity

We first address the city's claim that it is entitled to sovereign immunity from its LEOFF-member employees' tort claims. The city relies on RCW 4.96.010(1), which provides:

All local governmental entities, whether acting in a governmental or propriety capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith

purporting to perform their official duties, to the same extent as if they were a private person or corporation.

Although the statute generally waives a municipality's sovereign immunity, the city nonetheless contends that the phrase, `to the same extent as if they were a private person or corporation,' operates to provide the city with sovereign immunity from claims under LEOFF because a private person or corporation would not be required to pay into a worker's compensation fund and still be subject to an employee's tort suit.

The city's argument is inconsistent with Washington Supreme Court decisions holding that RCW 4.96.010 permits different rules of liability for the tortious conduct of governmental entities as compared with private persons. See Bailey v. Forks, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987); King v. City of Seattle, 84 Wn.2d 239, 243, 525 P.2d 228 (1974), overruled on other grounds by Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 999 P.2d 42 (2000); Evangelical United Brethren Church v. State, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). The difference in municipal liability compared to a private party's liability set forth in these cases does not preclude the applicability of RCW 4.96.010 to municipalities. As the Supreme Court explained:

{I}t is well recognized that RCW 4.96.010 was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same as with a private person.

J & B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), reversed on other grounds by Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988), and Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988). See also Beal v. City of Seattle, 134 Wn.2d 769, 784, 954 P.2d 237 (1998) (explaining public duty doctrine).

The correct interpretation of RCW 4.96.010 is that if a government is found to have engaged in tortious conduct under applicable substantive law, which may or may not be different for government than for private parties, then the government will be liable for such tortious conduct `to the same extent as if they were a private person or corporation.' See Taylor v. City of Redmond, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) (sovereign immunity waived by RCW 4.96.010 for suits brought by LEOFF Plan 1 members).

This reading of RCW 4.96.010 is consistent with the principle that the legislature is not presumed to do a meaningless act. Taylor v. City of Redmond, 89 Wn.2d at 319 ('{I}t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same.'). RCW 41.26.281 places a statutory duty on municipal corporations such as the city not to injure employee fire fighters or police officers by negligent acts or omissions. This satisfies the public duty doctrine and establishes a cause of action that is in turn permitted by RCW 4.96.010. Bailey, 108 Wn.2d at 269; Halvorson v. Dahl, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

In sum, the city's sovereign immunity from claims brought under the LEOFF statute is waived by RCW 4.96.010.

II. RCW 41.26.281 Does Not Violate Washington Constitution Article II, Section 19 or Article I, Section 12

We next address the city's arguments regarding the constitutionality of RCW 41.26.281. The city argues that RCW 41.26.281 is unconstitutional because it violates both article II, section 19, and article I, section 12 of the state constitution.

We apply de novo review when interpreting a statute and when applying constitutional rights. State v. Manro, 125 Wn. App. 165, 170, 104 P.3d 708, review denied, 155 Wn.2d 1010 (2005); State v. Salavea, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). Statutes are presumed to be constitutional. In no doubtful case should the courts pronounce legislation to be contrary to the constitution, and all doubts should be resolved in favor of constitutionality. State ex rel. Smilanich v. McCollum, 62 Wn.2d 602, 606, 384 P.2d 358 (1963).

A. Washington Constitution Article II, Section 19

The city claims that RCW 41.26.281 is unconstitutional because the title of the bill enacting it violates article II, section 19 of the Washington Constitution. Article II, section 19 provides that `{n}o bill shall embrace more than one subject, and that shall be expressed in the title.' The purpose of article II, section 19 is to "assure that the members of the legislature and the public are generally aware of what is contained in proposed new laws." State v. Thorne, 129 Wn.2d 736, 757, 921 P.2d 514 (1996). "'The title to a bill need not be an index to its contents; nor is the title expected to give the details contained in the bill." Washington Fed'n of State Employees v. State, 127 Wn.2d 544, 555, 901 P.2d 1028 (1995) (quoting Treffry v. Taylor, 67 Wn.2d 487, 491, 408 P.2d 269 (1965)). It is enough that the title "would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." Young Men's Christian Ass'n v. State, 62 Wn.2d 504, 506, 383 P.2d 497 (1963). Where the legislature has chosen a general title, that title will be granted a liberal construction. `So long as the title embraces a general subject, it is not violative of the constitution even though the general subject contains several incidental subjects or subdivisions.' Kueckelhan v. Fed. Old Line Ins. Co., 69 Wn.2d 392, 403, 418 P.2d 443 (1966).

The `right to sue' provision in LEOFF, RCW 41.26.281, was originally contained in a 1971 bill entitled `An Act Relating to Law Enforcement Officers and Fire Fighters.' Laws of 1971, 1st Ex. Sess., ch. 257, sec. 15.3 The city contends that `{n}o one reading this title would dream that it included a waiver of governmental employers' sovereign immunity.'

We disagree. As explained above, RCW 4.96.010, which was enacted in 1967, waived municipal sovereign immunity. Laws of 1967, ch. 164, sec. 1, amended by Laws of 1993, ch. 449, sec. 2.4 The LEOFF benefit system became law in 1970. Laws of 1970,

1st Ex. Sess., ch. 6, sec. 2(1), p. 35. The challenged effect was, therefore, accomplished not by chapter 41.26 RCW, as argued by the city, but by chapter 4.96 RCW.

Moreover, the title of the bill ('An Act Relating to Law Enforcement Officers and Fire Fighters') is constitutionally sufficient. The title embraces a general subject and indicates the scope and purpose of the legislation. It properly gives notice that would lead to an inquiry into the body of the act regarding the benefits granted to law enforcement officers and fire fighters, including the right to bring a cause of action alleging negligence against their municipal employers.

B. Washington Constitution Article I, Section 12

The city also argues that the LEOFF statute violates article I, section 12 of the state constitution5 by requiring the city to pay worker's compensation benefits to LEOFF Plan 2 members without giving the city any corresponding immunity from suit.

The city's position is wrong on several grounds. First, article I, section 12 distinguishes between a `municipal corporation,' such as the city, and other corporations and citizens. As held in City of Seattle v. State, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), the city `does not itself have rights under the equal protection clauses of the state and federal constitutions.' See also Grant County Fire Protection Dist. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004). The State grants municipal corporations many privileges and immunities that are not shared by citizens and private corporations. For example, the city of Seattle may tax its residents to raise money for activities such as fire fighting. Nothing in section 12 prohibits the State from imposing additional requirements on its municipal corporations in connection with such activities.

Also, the city does not and cannot argue either that a fundamental right is implicated or that private employers or LEOFF members are members of a suspect class. In an equal protection analysis, where a challenge to a provision does not implicate a fundamental right or suspect class, as those terms are defined in established case law, a court shall apply `minimal scrutiny.' Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm'rs, 92 Wn.2d 831, 835-36, 601 P.2d 936 (1979). When employing such scrutiny, the court engages in three inquiries:

First, does the classification apply alike to all members within the designated class?
Second, does some basis in reality exist for reasonably distinguishing between those within and without the designated class?
Third, does the challenged classification have any rational relation to the purposes of the challenged statute? More specifically, does the difference in treatment between those within and without the designated class serve the purposes intended by the legislation?

Id. (citations omitted).

Minimal scrutiny is called for in this case because no `privileges or immunities,' as that term is used in article I, section 12, are implicated. The power to bring suit for

negligence against an employer - or, conversely, the right to avoid such a suit - is not a privilege or immunity under article I, section 12.6

In applying the three steps of `minimal scrutiny' to RCW 41.26.281, we find that the provision is clearly applied alike to all members of the designated class. First, the provision applies to all members of the LEOFF system. Second, `some basis in reality' exists to distinguish the designated class, in that the class is distinguished by the definition established for `member' under the LEOFF system. And, third, the challenged classification has a rational relation to the purposes of the challenged statute. As the Supreme Court explained in Hauber v. Yakima County, 147 Wn.2d 655, 56 P.3d 559 (2002),

While the Industrial Insurance Act immunizes most employers from job related negligence suits, fire fighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job related negligence suits against their employers.

Hauber, 147 Wn.2d at 660 (citing RCW 51.04.010 and RCW 41.26.281).7

In Hansen v. City of Everett, 93 Wn. App. 921, 926, 971 P.2d 111 (1999), this court further explained the purposes and effects of RCW 41.26.281: `By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.' We also explained that RCW 41.26.281 provides a limited quid pro quo to the city in exchange for providing worker's compensation because employers are entitled to deduct worker's compensation payments from damages otherwise proved in a lawsuit against the employer. Hansen, 93 Wn. App. at 927.

Locke's claim against his employer in this lawsuit based on negligence is limited to the amount in `excess of damages over the amount received or receivable under {LEOFF}.' Gillis v. City of Walla Walla, 94 Wn.2d 193, 196, 616 P.2d 625 (1980), overruled on other grounds by Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 423, 869 P.2d 14 (1994). `The offset is applied regardless of the nature or type of disability benefits under LEOFF.' Hansen, 93 Wn. App. at 927.

Thus, traditional subrogation or collateral source principles are not necessarily applicable. Regardless of the percentage of comparative fault the jury might assess to a claimant, the municipal employer is entitled to an offset representing 100 percent of the LEOFF benefits paid plus the present value of LEOFF benefits to be paid in the future. Similarly, the offset is against the total verdict awarded, without regard to categorizations of special or general damages. Gillis, 94 Wn.2d at 196. This formula treats municipal defendants more favorably than most other tortfeasors or subrogors.

To establish a claim, LEOFF members must also prove that their employers acted negligently or intentionally. Therefore, the city is protected from product liability claims vis- -vis their employees since those are not based on negligence. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d 500 (1999).

Thus, RCW 41.26.281 serves vital governmental purposes, satisfying the `rational basis' inquiry. It gives extra protection to fire fighters and law enforcement officers because of the hazardous nature of their occupations, thereby encouraging discipline and efficiency in the workplace. Moreover, under the statute, the governmental employer receives benefits not available to private parties subject to suits in negligence. In this context, the governmental employer occupies a middle ground between nonemployer tortfeasors and nongovernmental employer tortfeasors. The legislature had a `rational basis' for the establishment of this middle ground. There is no constitutional infirmity.

III. Fire Fighter Trainees May Be Members of LEOFF

The city next contends that the trial court erred in denying the city's motion for summary judgment dismissal of Locke's claim on the ground that Locke was not a LEOFF Plan 2 member at the time of his injury. On appeal, the city frames the issue thusly:

Is a recruit in fire fighter training school who is eligible for workers' compensation benefits under RCW tit. 51 a `member' entitled to sue the City under RCW 41.26.281?

Br. of Appellants at 3. The city argues that, as a matter of law, Locke, as a fire fighter trainee, could not be a member of LEOFF, that the trial court erred in denying the city's motion for summary judgment on this issue, and that the claim against the city must be dismissed. We disagree.

Locke opposed the city's motion by submitting a Department of Retirement Systems' enrollment form completed by the city, which confirms that the city enrolled Locke as a `fire fighter' in LEOFF Plan 2 with April 19, 2000 listed as his first date of employee eligibility. Locke also submitted a September 15, 2003 letter from the Seattle Fire Department which states, `Since the effective date of your appointment to Fire Fighter, April 19, 2000, you have been a LEOFF II Retirement System member.'

An employer's understanding of whether its employee is a LEOFF member is a relevant and proper consideration in determining whether the employee is, in fact, a LEOFF member. Tucker v. Dep't of Ret. Sys., 127 Wn. App. 700, 709, 113 P.3d 4 (2005). Locke's submissions show that the city itself considered Locke to be a LEOFF member prior to the initiation of this lawsuit. This evidence was sufficient to defeat the motion.8

Moreover, we find unavailing the city's argument that, as a matter of statutory construction, Locke `could not have been a {LEOFF} member.' Reply Br. of Appellants at 1. Statutory construction is a question of law that we review de novo. Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). "'The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" Rabanco Ltd. v. King County, 125 Wn. App. 794,

800, 106 P.3d 802 (2005) (quoting Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). "'Absent ambiguity, a statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation.'" Hansen v. City of Everett, 93 Wn. App. 921, 924-25, 971 P.2d 111 (1999) (quoting Fray, 134 Wn.2d at 649).

Our examination begins with RCW 41.26.030(4)(a), which defines a `fire fighter' as:

Any person who is serving on a full time, fully compensated basis as a member of a fire department of an employer and who is serving in a position which requires passing a civil service examination for fire fighter, and who is actively employed as such.

The classification `fire fighter' is further defined in Washington Administrative Code (WAC) 415-104-225, which sets forth the Department of Retirement Systems rules regarding LEOFF membership and gives specific guidance regarding whom the legislature intended to include. It provides:

(2) Fire fighters. You are a fire fighter if you are employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, and as a consequence of your employment, you have the legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.
(a) "Fire protection activities" may include incidental functions such as housekeeping, equipment maintenance, grounds maintenance, fire safety inspections, lecturing, performing community fire drills and inspecting homes and schools for fire hazards. These activities qualify as fire protection activities only if the primary duty of your position is preventing, controlling and extinguishing fires.
(d) You are a fire fighter if you meet the requirements of this section regardless of your rank or status as a probationary or permanent employee or your particular specialty or job title.

Training for fire suppression, as Locke was doing when he fell, is clearly a `fire protection activity' that is `required for and directly concerned with preventing, controlling and extinguishing fires.' We are not persuaded by the city's attempts to argue otherwise. We also reject the city's argument that trainees such as Locke are not qualified LEOFF members because they are not fully-trained fire fighters. The statute does not distinguish between levels of training.

Furthermore, the city's proposed construction of WAC 415-104-225(2)(a) is contrary to the legislative purposes of LEOFF. The LEOFF system was established to provide retirement and other benefits to those who engage in the inordinately hazardous occupations of law enforcement and fire fighting. RCW 41.26.281, the statutory provision that grants LEOFF members the right to bring negligence actions against their governmental employers, gives those employers `a strong incentive for improved safety.' Hansen, 93 Wn. App. at 926. That purpose plainly extends to fire fighters while they are in training academies, where they must encounter dangerous conditions to prepare

themselves to perform safely and effectively in actual emergencies. We reject the city's proposed narrow definition of `fire fighter' in part because it discounts the value placed by the legislature upon those who undertake the risks involved in fire fighter training. The evidence presented, the wording of the relevant administrative code provisions, the language of the relevant statute, and the legislature's purpose in enacting the statute all support denial of the city's claim of error.

IV. Burden of Proof on Statutory Set-Off.

The city also assigns error to several of the trial court's instructions to the jury. In its first jury instruction challenge, the city focuses on jury instructions 18 and 20, which pertain to the parties' respective burdens of proof on damages. Instruction 18 informed the jury that Locke had the burden of proving damages such as pain and suffering and future economic damages. Instruction 20 stated that the city, in order to establish the amount of the offset, had the burden of proving the amount of benefits received and receivable.

The city argues that instructions 18 and 20 improperly gave inconsistent directions regarding the parties' respective burdens of proof. We disagree.

The focus of the city's argument is that instruction 20 was incorrect because Locke should have had the burden of proving the amount `received and receivable.' However, in its answer to Locke's complaint the city raised the issue of its entitlement to an offset such as that reflected in instruction 20. The city's pleading was proper under CR 8(c), which states that a party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c); Rainier Nat'l Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). The burden of proof is thereby placed upon the party asserting the avoidance or affirmative defense. See Gleason v. Metro. Mortgage Co., 15 Wn. App. 481, 551 P.2d 147 (1976) (accord and satisfaction); Tacoma Commercial Bank v. Elmore, 18 Wn. App. 775, 573 P.2d 798 (1977); 3A Lewis H. Orland & Karl B. Tegland, Washington Practice: Rules Practice CR 8 at 138 (4th ed. 1992). Because the city's contention that it was entitled to the statutory offset was in the nature of an avoidance,9 instruction 20 correctly stated the law.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

V. Assumption of Risk

The city raises several arguments related to its contention that Locke assumed the risk of being injured during fire fighter training. We begin with the city's claim that the trial court erred in denying its motions for summary judgment and judgment as a matter of law related to that defense.

First, the city waived its right to challenge the trial court's denial of its CR 50 motion relating to assumption of risk because it presented evidence after its motion was denied. Washington law provides that, `{o}nce a defendant puts on a case, any challenge to the sufficiency of the evidence before the court at that time is waived.' Hill v. Cox, 110 Wn. App. 394, 403, 41 P.3d 495 (2002) (citing Carle v. McChord Credit Union, 65 Wn. App. 93, 97 n.3, 827 P.2d 1070 (1992); Goodman v. Bethel Sch. Dist. 403, 84 Wn.2d 120, 123, 524 P.2d 918 (1974)).

Regarding the trial court's denial of the city's summary judgment motion on this issue, we engage in the same inquiry as the trial court. Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

The city argues that Locke assumed the risks inherent in fire fighting as a matter of law under the professional rescuer doctrine.10 However, RCW 41.26.281 specifically permits `professional rescuers' to sue their employers for injuries caused by their employers' negligence. Therefore, the legislature has concluded that the `professional rescuer doctrine' does not apply to such suits.

The city's claim that it was entitled to judgment as a matter of law on implied primary assumption of the risk, or at least entitled to have the jury decide that issue, is equally unavailing. The city ignores a crucial element of implied primary assumption of risk, which is that `the plaintiff `must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger." Home v. North Kitsap Sch. Dist., 92 Wn. App. 709, 721, 965 P.2d 1112 (1998) (quoting Zook v. Baier, 9 Wn. App. 708, 716, 514 P.2d 923 (1973)).

At trial, Locke presented expert testimony supporting his contention that he had no real alternative to participating in the drill that led to his injury if he wanted to remain a fire fighter. And, in response to the city's summary judgment motion, Locke submitted evidence that his actions were not voluntary because not completing the drill might have resulted in his losing his job.11

Viewing the evidence in the light most favorable to Locke, there were disputed material facts as to whether Locke had voluntarily assumed the risk. Thus, the trial court properly denied the city's motions for summary judgment and judgment as a matter of law related to that defense.

The city also assigns error to the trial court's refusal to give its proposed instructions relating to assumption of risk. We review alleged errors of law in jury instructions de novo. Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Jury instructions are sufficient if they (1) are supported by substantial evidence, (2) permit each party to argue its theory of the case; (3) are not misleading, and (4) when read as a whole, properly inform the trier of fact of the applicable law. Boeing, 101 Wn. App. at 633; State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). An erroneous instruction does not require reversal unless prejudice is shown. Boeing, 101 Wn. App. at 633. An error is not prejudicial unless it presumptively affects the outcome of the trial. Boeing, 101 Wn.

App. at 633. Whether to give a particular jury instruction, however, is within the trial court's discretion. Boeing, 101 Wn. App. at 632. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

If a party is dissatisfied with a proposed instruction, it is the duty of that party to propose an appropriate alternative instruction. If the court declines to give the proposed alternative instruction, the party must take exception to that ruling to preserve the issue for appeal. Hoglund v. Raymark Indus., Inc., 50 Wn. App. 360, 368, 749 P.2d 164 (1987); CR 51(f). This duty applies both to the instruction the court determines to give and the instruction the court determines not to give. The failure to object before the jury is instructed violates CR 51(f). Peterson v. Littlejohn, 56 Wn. App. 1, 11, 781 P.2d 1329 (1989).

Although the city expressed its dissatisfaction with Locke's proposed assumption of risk jury instructions, it failed to propose a legally correct alternative instruction. The city's proposed instruction 42 purported to be an unmodified version of Washington Pattern Jury Instruction (WPI) 13.03 on implied primary assumption of risk. However, the proposed instruction omitted the third paragraph of WPI 13.03,12 which is to be used `if there is an issue whether the plaintiff voluntarily accepted the risk.' 6 Washington Pattern Jury Instructions: Civil 13.03, note on use at 157 (4th ed. 2002). The trial court did not err by declining to give this instruction.

The city's proposed instruction 46 was also legally incorrect. It specifically referred to an affirmative defense, `express' assumption of risk, which had no basis in fact. Since the city provided no correct assumption of risk instruction, its special verdict form C, proposed instruction 51 (CP 4030-33), was also properly rejected by the trial court.13 Because the city did not properly object to the trial court's rejection of its proposed assumption of risk jury instructions, it is barred from challenging the instructions given. See Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986).

VI. Evidence of Department of Labor and Industries Violations

The Department of Labor and Industries (DLI) issued several citations against the Seattle Fire Department in connection with Locke's fall. The city contends that the trial court abused its discretion in several respects relating to statements by Locke's counsel and witnesses regarding those citations.

Prior to trial, the court ruled that the citations themselves could not be admitted as exhibits, but the fact that the city was cited could be admitted into evidence. Locke's counsel then referred to the citations in his opening statement. Locke's expert witness also testified regarding the citations. When Locke attempted to elicit testimony about the citations from a second expert witness, the court sustained the city's hearsay and relevance objections to those questions.

The city then moved for a mistrial, arguing that Locke impermissibly referenced the DLI citations in his opening statement but then failed to prove as much in his case in chief. The city also proposed a curative instruction to strike `any and all statements relating'14 to the citations. The trial court refused to declare a mistrial or give the city's proposed curative instruction, but noted that it would instruct the jury that attorneys' remarks are not evidence and that the jury must disregard any statements or remarks unsupported by evidence.

The record demonstrates that, in determining evidentiary issues regarding the DLI references and denying the city's motion in limine, motion for reconsideration, and proposed curative instruction, the trial court was properly guided by Cantu v. City of Seattle, 51 Wn. App. 95, 752 P.2d 390 (1988). The trial court weighed the various factors under ER 403 and permitted admission of some evidence regarding the agency findings, while excluding other evidence. See Cantu, 51 Wn. App. at 99-100; see also Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995); Conrad v. Alderwood Manor, 119 Wn. App. 275, 283, 78 P.3d 177 (2003). We find no abuse of discretion.

The city also claims that the trial court erred in denying its motion for a mistrial on the ground that testimony regarding the DLI violations caused undue prejudice. This court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court will find an abuse of discretion `only `when no reasonable judge would have reached the same conclusion." Id. (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711(1989)). A trial court's denial of a motion for mistrial will only be overturned when there is a `substantial likelihood' that the error prompting the mistrial affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)).

The trial court denied the motion for a mistrial, explaining:

With regard to the motion for mistrial, to the extent that plaintiffs have not proved up those violations, the {Department of Labor and Industries} violations, the jury has been instructed and will be instructed that they are to disregard any remarks, statements, or arguments that are not supported by the evidence. And I have no reason to believe that the jury will not be able to abide by that instruction. So the motion for mistrial, likewise, will be denied.

VRP (June 29, 2004) at 203. That instruction was, in fact, given. The trial court's reasoning was sound and its instructions to the jury were proper. A jury "is presumed to have followed the court's instructions." State v. Riker, 123 Wn.2d 351, 370, 869 P.2d 43 (1994). Accordingly, any error committed by the trial court in allowing references to the DLI citations complained of was cured by its instruction to the jury to disregard the references. The trial court did not abuse its discretion in denying the motion for a mistrial.

The last matter relating to evidence of the fire department's safety violations involves the expert testimony of Fire Chief John Gablehouse. During his opening statement, Locke's counsel stated that Chief Gablehouse, the Seattle Fire Department's Safety Officer, concluded that the Seattle Fire Department violated 32 safety rules and that about half of those violations contributed to Locke's fall. During Chief Gablehouse's direct testimony, the city objected to several of his statements. However, the city repeatedly failed to object on the ground of relevance to the testimony it now claims was irrelevant. The record shows that, while the city raised other objections, it did not raise relevancy objections to the testimony.15 ER 103(a)(1) requires, inter alia, a timely objection or motion to strike before error may be predicated on a ruling admitting evidence. The city may not properly assign error to a trial court ruling that admits such evidence in the absence of a timely and specific objection, stated on the same basis as urged on appeal. ER 103(a)(1); State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); Boyd v. Kulczyk, 115 Wn. App. 411, 416-17, 63 P.3d 156 (2003).

The city did object on the ground of relevance to two portions of testimony regarding the city's actions after Locke's fall. Over objection, Chief Gablehouse testified that the training division (1) `failed to notify division of injury for investigative purposes, serious injury,' and (2) `willfully failed to submit all material and data related to the accident for investigative purposes.' VRP (June 21, 2004) at 8. The city's stated objection was that Chief Gablehouse's opinion related to something that occurred after Locke was injured, and `has no relevance whatever to this proceeding.' Id.

The determination of the relevance of proffered evidence is a matter within the discretion of the trial court. Facts tending to establish a party's theory or qualify or disprove the testimony of an adversary are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978); Bloomquist v. Buffelen Mfg. Co., 47 Wn.2d 828, 289 P.2d 1041 (1955). The trial court could reasonably have determined that Chief Gablehouse's challenged testimony tended to support Locke's position that the city was negligent, or to cast doubt on the city's contention that it was not negligent. See, e.g., State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (furtive gestures or evasive behavior are circumstantial evidence of consciousness of guilt). Therefore, it was not an abuse of discretion for the trial court to overrule the city's objections.

The city also argues that the trial court erred when it permitted Locke's expert to respond to a question regarding the effect of the absence of a safety officer when Locke was injured. Although the relevance of this fact is questioned on appeal, the only objection made at trial was that the question called for speculation. The trial court properly overruled that objection. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 315, 858 P.2d 1054 (1993) (physician permitted to testify he would not have prescribed medication if he had been informed of risks); Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 753-56, 818 P.2d 1337 (1991) (parent permitted to testify about what she would have done had she been aware of a particular risk). Moreover, because the city did not object on the grounds of relevance, its present claim of error on that basis was waived. ER 103(a)(1).

The city also challenges the admission of portions of Chief Gablehouse's testimony16 on the basis that it was not a proper subject for expert testimony. With respect to the challenged portions, however, the record shows that the city either did not object on that basis,17 that it raised no objections at all,18 or that it did not raise this objection.19 Therefore, the present claims of error relating to that testimony were waived. ER 103(a)(1).

Regarding one portion of Chief Gablehouse's testimony, after he was asked a question but before he could answer, the City Attorney stated, `your honor, move to strike all of these opinions as expressing legal opinions.'20 The trial court denied the motion. We review a trial court's ruling on a motion to strike for an abuse of discretion. Orion Corp. v. State, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985).

It was not an abuse of discretion for the trial court to deny the motion to strike because the city did not specify the testimony it wanted stricken. In any event, Chief Gablehouse's opinions were properly admitted as admissions pursuant to ER 801 because, as a battalion chief in the Seattle Fire Department, he oversaw department safety procedures, he conducted an investigation of Locke's fall, and he submitted a report of his investigation to the department.

VII. Claim of Error Relating to Jury Instruction 13 Was Waived The city next assigns error to jury instruction 13, which was based on an administrative code section that the city claims was inapplicable. The city did not argue that exception below.

CR 51(f) states in relevant part:

Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

This procedure allows the court to correct mistakes in instructions and avoid the unnecessary expense of a new trial. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). If a party's exception fails to apprise the court of the specific points of law or of the alleged defect in the instruction in the context of the litigation, those points and defects will not be considered on appeal. Stewart v. State, 92 Wn.2d 285, 298, 597 P.2d 101 (1979).

At trial, the city's noted exception was:

I'm preserving my objection on the Court's instructions 11 and 12, and let's see, 13 with respect to our basic position that the vertical standard didn't apply in this circumstance. It is improper for the court to determine, as a matter of law, that no administrative rule was violated. VRP (July 7, 2004) at 12. The first part of the exception ('that the vertical standard didn't apply') applies only to instruction 12 and does not relate to instruction 13.

The second part of the exception makes no sense, in that the court was not determining that `no administrative rule was violated.'

Thus, the city's exception to instruction 13 not only failed to comply with CR 51(f), but also failed to apprise the trial court of the points of law raised in this appeal about that instruction. Because this argument was not properly raised at trial, we decline to review this claim of error on appeal. RAP 2.5(a).

VIII. Trial Court Properly Cured Jury Miscalculation

The city also argues that the trial court committed reversible error requiring a new trial because the jury failed to follow the court's instructions. Question 4 on the special verdict form asked the jury:

What do you find to be the total amount received or receivable by Kevin Locke or on his behalf, under the Law Enforcement Officers' and Fire Fighters' Retirement System, Chapter 41.26 RCW, including the stipulated amount of $138,980?
The jury answered `$24,133.00.'
In the city's motion for a new trial or for remittitur, it requested that the judgment based on the verdict be reduced by a setoff of $163,113. This figure was obtained by adding $24,133 (the jury's answer to question 4) to $138,980 (the stipulated offset).
The court granted the city the relief it requested. The judgment on jury verdict stated that the `Net Verdict Amount after reduction of LEOFF off- set and 10% comparative fault' was $1,511,718. That amount reflects that the court reduced the judgment by the amount requested by the city. Subtracting $163,113 from the jury award of $1,842,800 equals $1,679,687. The court then reduced that amount by 10% for comparative fault. Ten percent of $1,679,687 is $167,969 (after rounding). Subtracting $167,969 from $1,679,687 leaves $1,511,718, the amount of the net verdict.
Therefore, the city received precisely what it asked for, it suffered no prejudice, and it has no basis for appealing the judgment on this issue.
IX. Economic Damages Award

The city argues on appeal, as it did in its motion for a new trial, that there was not substantial evidence to support the jury award of $514,000 in economic damages.

We may not substitute our judgment for that of the jury so long as there is evidence that, if believed, would support the verdict. State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974). Generally, the determination of damages is within the province of the jury and courts are reluctant to interfere. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The law strongly presumes the adequacy of the verdict. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967). We examine the record provided to this court to determine whether there was sufficient evidence to support the verdict. Palmer, 132 Wn.2d at 197.

Locke presented substantial evidence related to the cost of his future medical care and treatment. He submitted medical bills and records showing the costs of treatments that he

had received and that he testified he would continue to need. Locke also testified that, as of the time of trial, he was still undergoing care and paying for massage and rolfing treatments. He further testified that physical therapy and massage therapy improved his condition. Karen Colara, a licensed physical therapist, testified that Locke will never have a normal gait, that his injuries are permanent, and that he was seeing a rolfer, a massage therapist, and a chiropractor. She also testified that Biosports, her physical therapy facility, charged Locke $160 per visit, and had charged Locke more than $10,000 for his treatment between August 2002 and May 2004. Instruction 19 advised the jury that `the average life expectancy of a male aged forty three years is 32.43 years.'

We find that Locke presented evidence that, given his permanent injuries, his increasing pain, and his medical treatments for those conditions, he would need such treatments over the next approximately 33 years at a cost of $160 per treatment and would need such treatment more than once a week. A weekly expense of $320 for such treatment over the next 33 years would total about $550,000, even without considering the effects of inflation or a worsening of Locke's conditions as he ages. Because the jury's award of economic damages lies within the range of evidence presented by the parties to this action, the trial court did not abuse its discretion by denying the CR 59(a) motion for a new trial. Palmer, 132 Wn.2d at 198.

X. Post-Verdict Motion for Periodic Payment of Damages

Finally, the city assigns error to the trial court's denial of its post-verdict motion for periodic payments. The trial court properly denied the motion based on Esparza v. Skyreach Equip., Inc., 103 Wn. App. 916, 15 P.3d 188 (2000). In that case, this court ruled that the trial court did not abuse its discretion by refusing to convert a future economic damages award to periodic payments where the defendant failed to notify the plaintiff of its intention to request periodic payments until after the jury returned its verdict. Esparza, 103 Wn. App. at 944.

Had the city filed its motion before the economic experts testified, the jury might have been provided testimony necessary to aid it in determining the duration of payments, the portions allotted to future medical care and future earnings, and the effect periodic payments might have on the award. In the absence of such determinations by the jury, the imposition of periodic payments by the trial court would have been arbitrary and untenable. The trial court correctly denied the motion.

Affirmed.

WE CONCUR:

Footnotes:

1. Persons who first became LEOFF members on or after October 1, 1977 are enrolled in LEOFF Plan 2. RCW 41.26.030(29).

2. Originally, Locke also sued the State of Washington, the Washington State Patrol, and several city and state employees for negligence and violation of 42 U.S.C. sec.1983. The claims related to sec.1983, the State, the State Patrol, and individual employees were dismissed. Locke's wife also voluntarily dismissed her claims.

3. The `right to sue' provision was originally codified as RCW 41.26.280. With minor changes, it was recodified as RCW 41.26.058 by Laws of 1991, ch. 35, sec. 28. It was recodified again as RCW 41.26.281 by Laws of 1992, ch. 72, sec. 11. The city's argument is not directed to either the 1991 or 1992 legislation.

4. The State's sovereign immunity is waived by RCW 4.92.090, enacted by Laws of 1961, ch. 136, sec. 1, amended by Laws of 1963, ch. 159, sec. 2.

5. `No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.'

6. See Paulson v. Pierce County, 99 Wn.2d 645, 664 P.2d 1202 (1983) (minimal scrutiny applied in article I, section 12 challenge where liability for flood control activities was precluded for counties but not municipalities); Campos v. Dep't of Labor & Indus., 75 Wn. App. 379, 880 P.2d 543 (1994) (minimal scrutiny applied in article I, section 12 challenge where the right to seek adjustment to workers' compensation claims was limited by a statute of limitations).

7. In Hauber, the court found that the county had statutory immunity against a suit brought by the estate of an emergency search and rescue volunteer and fire fighter who was killed while voluntarily attempting to save a diver. The court found that, `{i}f Hauber had responded to the call as a fire fighter or pursuant to a mutual aid agreement, he may have been entitled to bring suit against the city for negligence under RCW 41.26.281 by application of RCW 38.52.080.' Hauber, 147 Wn.2d at 661. Because the court found that Hauber was not acting as a fire fighter at the time of his death, but, rather, that he responded as volunteer, the county was immune pursuant to RCW 38.52.190. Id.

8. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

9. Shinn Irrigation Equip., Inc. v. Marchand, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969).

10. The city relies on Maltman v. Sauer, 84 Wn.2d 975, 978, 530 P.2d 254 (1975), and Hamilton v. Martinelli & Associates, 110 Cal. App. 4th 1012, 1014, 2 Cal. Rptr. 3d 168, 175 (2003), which involved suits against third parties for negligence, not statutory suits against employers. The holdings of those cases are inapplicable to the issue raised here.

11. The day before Locke fell, Chief Douce told the recruits she might have to call Chief Daniels and let him know that only seven or eight of the fifteen recruits would be graduating. Clerk's Papers (CP) at 2168 (excerpt from transcript of Greg Shoemake's Dec. 15, 2000 Department of Labor and Industries interview). The day of the fall, Chief Douce also told the recruits, `{Y}ou guys are going to stay as long as it takes because you guys owe us four hours from yesterday.' CP at 2359 (excerpt from April 3, 2003 Deposition of Lt. William `Brady' O'Brien).

12. `{A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct {to avoid the harm} {or} {to exercise or protect a right or privilege} because of the defendant's negligence.}'

13. For similar reasons, the court's instructions 6 and 17 and the special verdict form were not defective. The city's complaint in each instance was that these instructions did not refer to assumption of risk. However, the city failed to propose appropriate alternative instructions.

14. CP at 4045.

15. See VRP (July 21, 2004) at 5-6, 11-13, 16-20, and 180-81.

16. VRP (July 21, 2004) at 14-15, 23-24, and 77.

17. Id. at 14-15.

18. Id. at 23-24.

19. Id. at 77.

20. VRP (July 21, 2004) at 18.